No. 03-878

IN THE

Supreme Court of the United States

PHIL CRAWFORD, Interim Field Office Director, Immigration and Customs Enforcement, *et al.*,

Petitioners,

v.

SERGIO SUAREZ MARTINEZ,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF NATIONAL REFUGEE RESETTLEMENT AND ADVOCACY ORGANIZATIONS AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT

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STATEMENT OF INTEREST[1]

Amici Curiae are organizations dedicated to the resettlement in the United States of individuals fleeing repressive regimes and inhumane conditions in their homelands. *Amici Curiae* are uniquely aware of the persecution, hardship and fear endured by refugees, and why,

1. Letters of consent to the filing of this brief have been lodged with the Clerk of the Court pursuant to Sup. Ct. R. 37.3. Pursuant to Sup. Ct. R. 37.6, counsel for *Amici Curiae* states that no counsel for a party authorized this brief in whole or in part and no person, other than *Amici* or their counsel made a monetary contribution to the preparation or submission of this brief.

in light of these factors, the United States in particular, and the community of nations more generally, have welcomed such people, recognized their special status under international law, and accorded them the same rights and privileges as other citizens and nationals permanently residing in the country. Included among these are the right to due process and the right to be free from arbitrary and indefinite detention.

In working with refugee communities, *Amici Curiae* also have first-hand experience with the strong ties these communities have forged with the United States and the contributions they have made to U.S. society. *Amici Curiae* have witnessed the transition of refugees into productive members of society who raise families, pay taxes, send their children to public schools, and register for the selective service. For the Mariel Cubans, twenty-five years of residence in this country have strengthened these community ties and blurred the lines of immigration nomenclature such as "parolee" or "lawful permanent resident."

Each of the *Amici* on this brief have been associated with Mariel Cubans through either direct assistance or advocacy. All of the organizations identified as *Amici* are committed to ensuring that no refugee, even those admitted as parolees, is subject to indefinite detention. The issues presented in this case are central to their efforts to ensure that victims of persecution, violence and abuse are offered a safe haven and receive just treatment in their land of refuge. The *Amici* include the following groups.

Immigration and Refugee Services of America and the U.S. Committee for Refugees is a Washington, DC-based non-profit and non-sectarian organization with an eighty-year history of service to refugees and immigrants. It works through thirty-five community-based partners to provide direct assistance to refugees and, through the U.S. Committee for Refugees, to provide public information and advocacy for refugees, asylum seekers, and displaced persons.

Episcopal Migration Ministries ("EMM") is the refugee and immigration assistance and advocacy arm of the Episcopal Church USA. EMM resettles between 2,000 and 3,000 refugees annually through twenty-six dioceses of the Episcopal Church.

The Hebrew Immigrant Aid Society ("HIAS") has assisted more than four and a half million refugees, asylum seekers, and immigrants in its 122-year history. As the oldest international migration and refugee resettlement agency in the United States, HIAS has played a significant role in the rescue and relocation of Jewish survivors of the Holocaust, as well as Jews from Morocco, Ethiopia, Egypt and the communist countries of Eastern Europe.

The Ethiopian Community Development Council Inc. ("ECDC") is one of the National Resettlement Agencies authorized by the U.S. Department of State to resettle refugees in the United States. ECDC has worked for the last twenty-eight years to support refugees and immigrants from diverse cultural backgrounds, while maintaining a focus on African newcomers.

The International Rescue Committee ("IRC"), founded in 1933, is the leading non-sectarian voluntary organization providing relief, protection and resettlement services for refugees and victims of oppression or violent conflict. The IRC is committed to ensuring freedom, human dignity and self-reliance, working in thirty-three countries overseas and more than nineteen locations in the United States.

The Southeast Asia Resource Action Center ("SEARAC") is a national advocacy organization working to advance the interests of Cambodian, Laotian, and Vietnamese Americans through leadership development, capacity building, and community empowerment. For twenty-five years, SEARAC has been an important resource and a vital voice for Southeast Asian Americans.

SUMMARY OF ARGUMENT

The United States has always proclaimed itself a generous and compassionate nation with regard to refugee protection. In 1783, George Washington described America as a "land whose 'bosom is open to receive the persecuted and oppressed of all nations.'"[2] Ronald Reagan echoed this sentiment nearly 200 years later:

> Can we doubt that only a Divine Providence placed this land, this island of freedom, here as a refuge for all those people in the world who yearn to breathe free? Jews and Christians enduring persecution behind the Iron Curtain; the boat people of Southeast Asia, Cuba and of Haiti; the victims of drought and famine in Africa, the Freedom Fighters in Afghanistan.[3]

In addressing the present controversy, *Amici Curiae* respectfully submit that this Court should uphold the spirit of these lofty ideals by prohibiting the indefinite detention of refugees such as the Mariel Cubans, who were openly welcomed by this nation and permanently resettled like other refugees.

This brief makes two arguments in support of Respondent. First, an examination of the history of the Mariel Cubans reveals that they were welcomed by the United States as a group of refugees fleeing Fidel Castro's communist regime, and that the United States intended they be permanently resettled. Therefore, this Court's holding in *Zadvydas v. Davis*, 533 U.S. 678 (2001), logically extends to protect all Mariel Cubans – even those who have never changed their formal immigration status to lawful permanent resident – from indefinite post-removal period detention

2. Gil Loescher & John A. Scanlan, *Calculated Kindness: Refugees and America's Half-Open Door, 1945 to the Present* xiii (1986).

3. *Text of Reagan's Speech Accepting the Republicans' Nomination*, N.Y. Times, July 18, 1980, at A8.

under 8 U.S.C. § 1231(a)(6). Over the quarter-century since their arrival, various Government policies designed to treat the Mariel Cubans as permanently resettled achieved their intended effect by allowing these refugees to cultivate and enjoy significant ties to the communities in which they made their homes. These realities of the Mariel Cubans' presence in the United States should inform the Court's interpretation of section 1231(a)(6).

Second, international law applicable to refugees contemplates that they be resettled and accorded the same rights and privileges as nationals, which include citizens and lawful permanent residents. Accordingly, under international law principles, the Government must accord the Mariel Cubans the same due process protections against indefinite post-removal period detention under 8 U.S.C. § 1231(a)(6) that were articulated by this Court for former lawful permanent residents in *Zadvydas*.

Collectively, these arguments expose the incongruity of the Government's position that the Mariel Cubans can be welcomed as refugees, resettled in accordance with U.S. and international law, and then – twenty-five years later – be denied the due process protections accorded to former lawful permanent residents by this Court in *Zadvydas*. Simply put, in light of the circumstances surrounding the Mariel Cubans' arrival and resettlement, the Government's continued hyper-technical reliance on the so-called "entry fiction" to deny constitutional protections to and indefinitely detain Mariel Cubans such as Respondent is particularly misplaced.

ARGUMENT

In *Zadvydas*, the Court concluded that 8 U.S.C. § 1231(a)(6) imposed a presumptive limit of six months on the Government's ability to detain a former lawful permanent resident who is subject to an order of removal that cannot be effectuated. The Court's opinion in *Zadvydas* recognized that post-removal period detention serves only two governmental

interests: (1) assuring that the alien will not flee and will actually leave the country if and when it becomes possible to effectuate removal; and (2) preventing the release of dangerous aliens into the community pending removal. The Court unambiguously held that the statute "does not permit indefinite detention," and affirmed that "[f]reedom from imprisonment – from government custody, detention or other forms of physical restraint – lies at the heart of the liberty" protected by the due process clause of the Constitution. 533 U.S. at 689-90.

On its face, section 1231(a)(6) makes no distinction between former lawful permanent residents, such as Zadvydas, and other aliens, such as Respondent Suarez-Martinez, a refugee brought into the United States as a parolee for humanitarian reasons pursuant to 8 U.S.C. § 1182(d)(5). As others have argued, that lack of a statutory distinction requires that *Zadvydas* controls here.[4]

Indeed, in a recent opinion involving an enemy national captured abroad in connection with hostilities in Afghanistan and incarcerated at Guantanamo Bay, Cuba, the Court noted that 28 U.S.C. § 2241 – another protection against arbitrary and unreasonable government detentions – makes no distinction on its face between United States citizens and others. Nor is there any clearly-expressed congressional intent to make such a distinction. *Rasul v. Bush*, 124 S. Ct. 2686, 2696 (2004). The Court held that it could not draw a distinction between U.S. citizens and non-citizens in the application of the statute, and therefore permitted judicial review of the detention of an alien as an enemy combatant. In the absence of any statutory distinction in section 1231(a)(6) between a former lawful permanent resident and a refugee brought into the United States pursuant to the

4. *See, e.g.*, Brief for Petitioner, *Benitez v. Mata*, No. 03-7434 (U.S. Feb. 25, 2004); Brief for the American Civil Liberties Union as *Amicus Curiae* Supporting Petitioner, *Benitez v. Mata*, No. 03-7434 (U.S. Feb. 25, 2004).

Government's parole authority nearly a quarter-century ago, the Court should similarly conclude that the presumption of a maximum period of six months applies equally to post-removal period detention of the latter.

Despite the absence of a statutory distinction based on immigration status in section 1231(a)(6), the Government attempts to read one into the statute by arguing that, because the Mariel Cubans were paroled into the United States upon arrival for reasons of administrative convenience, their due process rights fall victim to the paradoxical so-called "entry fiction." Under the "entry fiction," Respondent – despite having lived in the United States for the past twenty-five years – is deemed not to have "entered" the United States and can be treated as a noncitizen perpetually seeking admission at the border, simply because he was admitted as a parolee pursuant to 8 U.S.C. § 1182(d)(5)(A). Under this "entry fiction," individuals like Respondent, who have been physically and lawfully within the country's territorial boundaries for almost a quarter-century, are not considered to be present within the United States. *See* Brief for the Respondents at 34-40, *Zadvydas v. Davis*, 533 U.S. 678 (2001) (No. 99-7791). The Government argues that this hyper-technical classification deprives Respondent of the Fifth Amendment due process protections otherwise available to "all 'persons' within the United States." *Zadvydas*, 533 U.S. at 693 (noting that "the Due Process Clause applies to all 'persons' within the United States, including aliens, whether their presence here is lawful, unlawful, temporary or permanent") (citing *Plyler v. Doe*, 457 U.S. 202, 210 (1982); *Mathews v. Diaz*, 426 U.S. 67, 77 (1976); *Kwong Hai Chew v. Colding*, 344 U.S. 590, 596-98, 596 n.5 (1953); *Yick Wo v. Hopkins*, 118 U.S. 356, 369 (1886); and *Shaughnesssy v. United States ex rel. Mezei*, 345 U.S. 206, 212 (1953)).

If the Court were to accept the Government's argument and conclude that inquiry beyond the plain language of

section 1231(a)(6) is necessary to discern whether the *Zadvydas* "reasonable time" restriction on detentions applies, *Amici Curiae* posit that the Court's analysis of the relevant statutory and constitutional issues should be informed by the special status of refugees like the Mariel Cubans under U.S. and international law. Given the history of the Mariel Cubans and their treatment in the United States, application of the "entry fiction" here would be anomalous. It makes no sense to provide greater due process protections to foreign nationals who are alleged to have taken up arms against the United States than to refugees whom the nation welcomed with open arms and treated as permanently resettled residents for a quarter century.

Accordingly, the first section of this argument details the history of the Mariel Cubans and discusses analogous instances in history where the United States used the parole power to extend similar welcoming treatment to groups fleeing repressive regimes en masse.[5] From the moment of their eviction from Cuba, to President Carter's welcoming them to the United States, to their resettlement here over the past quarter century, the Mariel Cubans have been treated as refugees intended for resettlement and integration into this country. This treatment should entitle them to the same rights as the Court mandated for former lawful permanent residents in *Zadvydas*.

The second section notes the special treatment and status afforded refugees under treaties adopted by the United States that contemplate that refugees such as the Mariel Cubans be resettled with all the rights and privileges of nationals – including the right to be free from indefinite detention. In short, in light of the historical background of the Mariel Cubans and the special protections afforded to refugees under international law, the Government's efforts to exclude refugee-parolees from the protections the Court recognized in *Zadvydas* should be rejected.

5. For this reason, this brief occasionally refers to Mariel Cubans as "refugee-parolees."

I. The United States Welcomed The Mariel Cubans As Refugees With The Intent Of Permanent Resettlement

A. The Mariel Cubans Fled Cuba As Refugees

In the spring of 1980, in a desperate attempt to flee Cuban dictator Fidel Castro's oppressive regime, six Cubans crashed a bus through the gate and onto the grounds of the Peruvian embassy in Havana.[6] Castro demanded that the asylum-seekers be returned, but the Peruvian Government refused. In a quixotic but failed effort to demonstrate that, given the chance, no Cuban citizen would actually choose to leave, the Cuban leader announced by radio that anyone wishing to leave Cuba should go to the Peruvian embassy.[7] Three days later, the Peruvian embassy held 10,000 Cubans.[8] The situation quickly degenerated into a humanitarian crisis as the absence of food and water reduced the stranded Cubans to eating tree leaves.[9]

A group of Cuban exiles in Miami organized a "freedom flotilla" – forty-two boats loaded with food and medicine dispatched to Havana intended to relieve the Cubans still stranded in the Peruvian embassy.[10] In an attempt to preserve lives in the face of a dangerous sea crossing, the Carter Administration persuaded Castro to permit refugees to leave via a U.S. Government-controlled airlift for processing in Costa Rica. However, after the United States had flown out only 700 refugees from the embassy,[11] Castro called off the

6. Félix R. Masud-Piloto, *With Open Arms: Cuban Migration to the United States* 78 (1988).

7. *Id.* at 79.

8. *Id.*

9. Lydia Martin, *Arturo Fuerte*, Miami Herald, May 23, 1999, at 2I.

10. Masud-Piloto, *supra* note 6, at 83.

11. Mario A. Rivera, *Decision and Structure: U.S. Refugee Policy in the Mariel Crisis* 6 (1991).

airlift and opened the port of Mariel to any and all Cuban-Americans seeking to bring relatives back with them to the United States.[12]

Thousands of exiled Cuban-Americans, many of whom had paid hundreds, sometimes thousands of dollars for the trip, arrived in Mariel harbor only to find that not only would they return to the United States with their relatives, but that they would be forced to take strangers as well. Castro required each boat to carry back four additional Cubans for each relative who boarded.[13] One Cuban-American woman reported that "[e]ven the people who got relatives, they did not get all their families."[14] Because the Cuban Government denied the boat captains control over the number or identities of people boarding for the return trip, some of the boats returned empty, while others were dangerously overloaded with Cubans desperate to flee the Castro regime.[15] Those who left risked everything by doing so. At least twenty-six people died in the crossing. Nevertheless, more than 125,000 Cubans fled to U.S. shores before Castro closed the port of Mariel.[16]

To accommodate the high number of refugees and the rapid rate of their arrival,[17] the Federal Government set up

12. Masud-Piloto, *supra* note 6, at 83.

13. Ward Sinclair & Joanne Omang, *U.S. Cracks Down on Refugee Boats*, Wash. Post, Apr. 26, 1980, at A22.

14. Ed Bruske, *The Perilous Journey; Cubans Sail with Hope, Return with Empty Arms*, Wash. Post, May 22, 1980, (Md. Weekly), at Md. 1.

15. *See id.*; Karen DeYoung, *American Boaters Caught in Bind Between U.S., Cuban Authorities*, Wash. Post, May 20, 1980, at A1.

16. Jonathan King & Luisa Yanez, *Season of Chaos*, Sun-Sentinel (Fort Lauderdale, Fla.), May 7, 2000, at 1G.

17. More than 16,000 refugees arrived in the United States during one six-day period alone – compelling evidence of their (Cont'd)

temporary housing and processing centers, most of which were located in Florida, but some of which were established in Wisconsin, Pennsylvania, and Arkansas.[18] Thousands of new arrivals camped out that summer in makeshift housing in the Orange Bowl stadium in Miami and in a number of different U.S. military bases, and were fed and clothed by a massive influx of donations from surrounding communities.[19] The situation was so dire that the Carter Administration declared a state of emergency in south Florida, delegating coordination to the Federal Emergency Management Agency.[20]

B. The Parole Authority Was Used To Admit Mariel Cubans Into The United States To Swiftly Address A Growing Humanitarian Crisis While Circumventing Existing Constraints On Admitting Large Groups of Refugees

In the spring and summer of 1980, the Carter Administration's policy regarding the thousands of fleeing Cubans was to welcome them with "open heart and open arms."[21] This welcoming attitude was fully consistent with the treatment of refugees in prior years in comparable humanitarian crises. President Eisenhower stated in 1961,

(Cont'd)
tremendous desire to leave Cuba and come to the United States. E.A. Torriero & Luisa Yanez, *From Mariel to Miami; Cuban Refugees Changed the Face of South Florida*, Sun-Sentinel (Fort Lauderdale, Fla.), May 21, 1995, at 1A.

18. Mark S. Hamm, *The Abandoned Ones: The Imprisonment and Uprising of the Mariel Boat People* 54 (1995).

19. Dennis A. Williams et al., *The Cuban Tide Is a Flood*, Newsweek, May 19, 1980, at 28.

20. David W. Engstrom, *Presidential Decision Making Adrift* 141 (1997)

21. David M. Alpern et al., *Carter and the Cuban Influx*, Newsweek, May 26, 1980, at 22.

"[o]ur people opened their homes and hearts to the Hungarian refugees four years ago. I am sure we will do no less for the distressed Cubans."[22] President Kennedy had likewise labeled America "a lantern in the dark for those who love freedom but are persecuted, in misery, or in need."[23] While the factual circumstances in 1980 were similar, the political landscape was somewhat different.

The overwhelming number of Cubans arriving in the United States in the spring and summer of 1980 followed fast on the heels of a recent mass influx of Haitian immigrants. Thus, while the Mariel Cubans had been openly encouraged to come, their arrival found the United States somewhat administratively unprepared. For example, the then newly-enacted Refugee Act of 1980 ("1980 Act")[24] envisioned that, before coming to the United States, refugees would land in a country of first asylum for processing by U.S. officials, and thus the practice of paroling refugees en masse would shift to a limited case-by-case basis. As the Carter Administration recognized that the United States had to immediately provide permanent refuge to the large numbers of refugees fleeing the oppressive communist Castro regime, it realized that the parole authority was the only legal mechanism through which to accomplish this goal.

Faced with these concerns, the Carter Administration issued a policy statement granting parole as "Cuban/Haitian Entrants (status pending)" to Cubans arriving between April 21, 1980 and June 19, 1980, as well as to Haitians in INS proceedings pending as of June 19, 1980.[25] The Mariel

22. Masud-Piloto, *supra* note 6, at 32.

23. *Id.* at 44.

24. Refugee Act of 1980, Pub. L. No. 96-212, § 207, 94 Stat. 102, 103 (codified as amended in scattered sections of 8 U.S.C.).

25. *Text of State Dept. Statement on a Refugee Policy*, N.Y. Times, June 21, 1980, at 8. Importantly, the Carter Administration's (Cont'd)

Cubans were not formally classified as "refugees" because, as set forth above, that label would have potentially placed the Carter Administration at odds with the case by case screening requirements of the 1980 Act.[26] The Administration announced that it would submit legislation to Congress "as soon as possible" to "[e]stablish a 'Cuban-Haitian Entrant' status for recently arrived Cubans and Haitians"; provide federal benefits and emergency assistance to the entrants; and "[p]rovide for conversion to permanent resident alien status after two years."[27] In October 1980, the Cuban/Haitian Entrant classification was extended to Cubans and Haitians arriving between June 20 and October 10, 1980, thus encompassing all Cubans who arrived as part of the Mariel boatlift.[28] These policies reflected the Government's position that "[t]hese people for the most part are here to stay,"[29] while skirting political and legal issues that might have otherwise arisen under the 1980 Act.

Thus, the Government used its parole power as a method of circumventing existing constraints on bringing large groups of refugees into the country while swiftly addressing a humanitarian crisis. *See* Brief of *Amicus Curiae* Florida Immigrant Advocacy Center and Rafael Peñalver in Support of Petitioner at 24-27, *Benitez v. Mata*, No. 03-7434 (U.S. Feb. 23, 2004). Accordingly, even though they were not technically admitted as refugees, Mariel Cuban parolees were,

(Cont'd)
decision to label the Mariel Cubans as "entrants" undercuts the "entry fiction" relied on by the government in this case to avoid extending the protections of *Zadvydas* to Respondent.

26. Engstrom, *supra* note 20, at 139.

27. *Text of State Dept. Statement on a Refugee Policy*, *supra* note 25.

28. Rivera, *supra* note 11, at 15.

29. Robert Pear, *U.S. to Let Refugees from Cuba and Haiti Remain for 6 Months*, N.Y. Times, June 21, 1980, at 1.

for all practical purposes, refugees intended for permanent resettlement in the United States. To persist in applying the "entry fiction" to deny Mariel Cuban parolees due process rights with respect to their indefinite detention is thus both intolerable and unnecessary.

C. The Government Historically Has Used The Parole Power To Resettle Large Refugee Groups

This Court's interpretation of section 1231(a)(6) should recognize that the statute's application goes beyond the facts applicable to Respondent and extends to other refugees admitted under the parole power as well. In fact, the parole power has often been used by the Government to permanently resettle refugees while skirting formal immigration quotas.

In 1956, in the wake of the Soviet puppet regime's crackdown on efforts at democratic reform in Hungary, approximately 200,000 Hungarians fled their homeland.[30] U.S. immigration quotas at the time were inadequate to admit such a large number.[31] Refusing to turn the nation's back on a group of refugees, President Eisenhower announced his decision to admit 21,200 Hungarians, 15,000 of whom were paroled.[32] As with the Mariel Cubans, parole was used as a tool to permanently resettle the Hungarian refugees: Congress later passed legislation granting them lawful permanent resident status.[33]

In 1975, the collapse of the South Vietnamese Government, coupled with Pol Pot's rise to power and instigation of genocide and torture against the Cambodian people, caused the exodus of hundreds of thousands of

30. Loescher & Scanlan, *supra* note 2, at 50.

31. *Id.* at 55. Hungarian quotas had been mortgaged to exceed the numbers allowable for several years. *Id.*

32. Loescher & Scanlan, *supra* note 2, at 55.

33. Act of July 25, 1958, Pub. L. No. 85-559, § 2, 72 Stat. 419, 419-20.

refugees from Southeast Asia,[34] a large proportion of whom eventually reached American shores.[35] As in the late 1950s, U.S. immigration quotas were absurdly low when compared to the number of individuals seeking admission. In ten separate actions, each one paroling in thousands of Indochinese and each one followed by a build-up of newly-arrived refugees, the Ford and Carter Administrations paroled over 300,000 Indochinese refugees between 1975 and 1979.[36] The Indochinese were later given the right to adjust their status to that of lawful permanent resident.[37]

The history of Cuban immigration into the United States demonstrates a similar use of the parole power. Between 1959 and 1961, 125,000 Cubans fled to the United States to escape Castro's new communist dictatorship. The Kennedy Administration used the parole authority to admit hundreds of thousands of these refugees.[38] In time, the admission of Cubans under the parole authority in excess of the established quota limits[39] became an accepted aspect of U.S. refugee policy.[40]

34. Harvey Gee, *The Refugee Burden: A Closer Look at the Refugee Act of 1980*, 26 N.C. J. Int'l L. & Com. Reg. 559 601 (2001) (reviewing Peter H. Schuck, *Citizens, Strangers, and In-Betweens: Essays on Immigration and Citizenship* (1998)).

35. Loescher and Scanlan, *supra* note 2, at 121.

36. Gee, *supra* note 34, at 603.

37. Act of Oct. 28, 1977, Pub. L. No. 95-145, 91 Stat. 1223.

38. Loescher & Scanlan, *supra* note 2, at 68. Almost 250,000 Cubans arrived in America between 1959 and 1962. *Id.* at 70.

39. Immigration and Nationality (McCarran-Walter) Act, Pub. L. No. 82-414, 66 Stat. 163 (1952). The McCarran-Walter Act amended immigration quotas to promote the admission of persons with needed skills.

40. *See* Deborah E. Anker & Michael H. Posner, *The Forty Year Crisis: A Legislative History of the Refugee Act of 1980*, 19 San Diego L. Rev. 9, 16 (1981).

In fact, between 1962 and April 1979, the parole power was used to admit close to 700,000 Cubans.[41]

Beginning in 1961, Cubans received an additional benefit: Cuban-Americans could apply, on behalf of their relatives still in Cuba, for waivers of the requirement to obtain visas in order to enter the United States.[42] These individuals were then paroled into the country.[43] A 1967 INS publication noted that these parolees were "refugees . . . coming to stay indefinitely, many intending to work."[44] Under the Cuban Refugee Adjustment Act of 1966 ("1966 Act"),[45] Cubans admitted under parole status could apply for permanent residency status after living in the United States for only two years.

These historical examples establish that the parole power has been commonly used by the Government to facilitate the permanent resettlement of large refugee groups. As a result, under the Government's argument, numerous refugees are potentially subject to a summary denial of the due process protections outlined by the Court in *Zadvydas* by virtue of the administrative mechanism by which they were admitted to this country. Such a result, and on such a large scale, is simply inconsistent with the Government's historical intent that the parole of refugees be used as a tool to assist their permanent resettlement in the United States. Accordingly, the Court should eschew application of the "entry fiction" to deny fundamental rights to refugees who have in fact been treated as "entrants" and permanently resettled.

41. Ira J. Kurzban, *A Critical Analysis of Refugee Law*, 36 U. Miami L. Rev. 865, 871 (1982).

42. Robert L. Woytych, *The Cuban Refugee*, I & N Rep., Oct. 1967, at 15, 15.

43. *Id.* at 16.

44. *Id.*

45. Pub. L. No. 89-732, 80 Stat. 1161 (1966).

D. The United States Intended That The Mariel Cubans Be Permanently Resettled

Recognizing that "it is time Cuban/Haitian Entrants are granted a status that is consistent with the reality of their permanent residency in the United States,"[46] Congress embarked on a number of different legislative initiatives designed to conform the law to the fact of the Mariel Cubans' permanent resettlement. With the 1980 Act, Congress amended the 1966 Act, making Cuban parolees eligible for lawful permanent resident status after only one year continuous residence in the United States.[47] Further, like refugees, there is no limit to the number of Cuban parolees that can adjust to lawful permanent residency each year. It is also significant to note that, unlike other legislation that provides for the adjustment of status of other populations, only the 1966 Act, enacted specifically for Cubans, provides no cut-off date for applicants. The United States wanted to ensure that Cubans had legal avenues to remain in the United States permanently whether they were paroled, inspected, or admitted. Moreover, Congress ensured that the Mariel Cubans in particular had the right to apply for lawful permanent resident status with the passage of the Immigration Reform and Control Act of 1986 ("1986 Act"), which explicitly allowed Cuban/Haitian Entrants (status pending) the ability to apply for the same adjustment.[48]

Indeed, the Mariel Cubans, like all refugee-parolees, also benefited from policies designed to facilitate their ability to

46. H.R. Rep. No. 99-682(I), at 76 (1986).

47. Refugee Act of 1980, Pub. L. No. 96-212, § 209, 94 Stat. 102, 105-06. The Cuban Adjustment Act of 1966 had imposed a requirement of two years continuous residence. Pub. L. No. 89-732, 80 Stat. 1161 (1966).

48. Pub. L. No. 99-603, § 202, 100 Stat. 3359, 3404-05. *See also* Brief of Amicus Curiae Florida Immigrant Advocacy Center and Rafael Peñalver in Support of Petitioner at 29-30, *Benitez v. Mata*, No. 03-7434 (U.S. Feb. 23, 2004).

adjust status under the 1966 and 1986 Acts. In fact, refugee-parolee populations are commonly exempt from certain grounds of inadmissibility that apply to immigrants, including sections 212(a)(4)-(6) of the Immigration and Nationality Act, which exclude immigrants from adjustment on the basis of, among other things, economics, documentation, and manner of entry.[49] In addition, Cubans are not required to apply for political asylum or prove their refugee status.[50] These exemptions represent legal recognition of the unique circumstances that brought Cubans to our shores and our intent for them to remain permanently in the United States.

Outside of legislation allowing the Mariel Cubans to change their formal immigration status, the U.S. Government provided other benefits designed to assist in the permanent resettlement of the Mariel Cubans in the United States. Since the passage of the Migration and Refugee Assistance Act of 1962, Cubans have received funds to assist in their permanent integration into American society.[51] In September 1980, the Carter administration made its first major funds appropriation to assist the Mariel Cubans in particular when it set aside over $31 million from the U.S. Emergency Refugee and Migration Assistance Fund "for the purposes of processing, transport[ing], caring [for], and resettling" Cuban and Haitian refugees.[52] Likewise, Cuban/Haitian Entrants have been provided Supplemental Security Income ("SSI"), Medicaid, Aid to Families with Dependent Children ("AFDC"), and other federal benefits.

49. Cuban Refugee Adjustment Act, Pub. L. No. 89-732, 80 Stat. 1161 (1966).

50. Note, *The Cuban Adjustment Act of 1966: Mirando por los Ojos de Don Quijote o Sancho Panza?*, 114 Harv. L. Rev. 902, 906 (2001).

51. Pub L. No. 87-510, 76 Stat. 121; *see, e.g.*, Presidential Determination No. 95-13, 60 Fed. Reg. 2675, (Dec. 31, 1994).

52. Presidential Determination No. 80-27, 45 Fed. Reg. 65,993 (Sept. 21, 1980).

With the passage of the Refugee Education Assistance Act of 1980, Congress not only provided educational benefits for a great number of Cuban refugee children, but also authorized benefits under other refugee assistance statutes to apply "in the same manner and to the same extent with respect to Cuban and Haitian entrants."[53] The Office of Refugee Resettlement, created in 1980, provides cash, medical benefits, social services, preventative health care, and services for young refugees – all programs that have benefited the Mariel Cubans.[54] The Office also offers cash grants to help communities with resettlement problems.[55] This aid is available to those that fall under INS definition of "refugee" as well as to "Cuban/Haitian entrants."[56]

Mariel Cubans have also benefited from lower eligibility requirements for certain federal benefit programs. In fact, the 1986 Act imposed different restrictions on the eligibility for federally funded public assistance programs of aliens in the statuses it created – temporary resident, special agricultural worker, and replenishment agricultural worker. Members of each category are restricted from becoming eligible for certain programs for five years after the initiation of those statuses. The five-year restrictions apply even if they become lawful permanent residents during that period.[57] Most temporary resident aliens are subject to this rule for

53. Pub. L. No. 96-422, § 501(b), 94 Stat. 1799, 1809.

54. *See* Office of Refugee Resettlement, U.S. Dep't of Health and Human Services, *Factsheet: Office of Refugee Resettlement Administration for Children and Families, at* http://www.acf.dhhs.gov/programs/orr/ mission/factsheet.htm (last updated Feb. 5, 2002).

55. *Id.*

56. Office of Refugee Resettlement, U.S. Dep't of Health and Human Services, *Eligibility Guidelines for Refugee Assistance and Services Through the Office of Refugee Resettlement, at* http://www.acf.dhhs.gov/programs/orr/geninfo/index.htm (last updated Nov. 10, 2003).

57. 8 U.S.C. §§ 1160(f), 1255a(h).

AFDC, some medical assistance, and food stamps, as well as for additional financial assistance programs that the Attorney General designates.[58] Only temporary residents who fall into the category of Cuban/Haitian entrants are completely exempt.[59]

These policies have had their intended effect to integrate Mariel Cubans as permanently resettled. In South Florida, for example, Mariel Cubans are successful fashion designers and owners of restaurant chains and multimillion dollar businesses.[60] Many of those who are involved in the arts are making a significant mark in American culture after being censored in Cuba from displaying their talents.[61] Their numbers are so large that they have been dubbed "The Mariel Generation."[62]

Zadvydas holds that the Government cannot indefinitely detain under 8 U.S.C. § 1231(a)(6) a former lawful permanent resident who is subject to an order of removal. As outlined above, the Mariel Cubans are beneficiaries of legislation specifically designed to assist in their permanent resettlement. These laws have helped the Mariel Cubans as a group successfully integrate into U.S. society and establish family, community, and economic ties, directly cutting against the Government's hyper-technical reliance on a legal fiction that insists they have never entered the country. That some Mariel Cubans have committed crimes that rendered them subsequently removable does not make them any different from the lawful permanent residents in *Zadvydas* who also committed crimes. The fact that they are criminals renders

58. 8 U.S.C. § 1255a(h)(1).

59. 8 U.S.C. § 1255a(h)(2)(A).

60. Elaine De Valle & Fabiola Santiago, *The Legacy of Mariel Miami Experience Fueled Success*, Miami Herald, Apr. 18, 2000, at 1A.

61. Fabiola Santiago, *Mariel Cubans Continue to Cross into the World of High Art, Culture*, Miami Herald, May 7, 2000, at 1M.

62. De Valle & Santiago, *supra* note 60.

them removable but does not deprive them of due process, especially with respect to their right to be free from indefinite detention.

The Government's use of the parole power to admit the Mariel Cubans reflected merely the absence of any other legal instrument to respond to an immediate and overwhelming humanitarian crisis. Use of the parole power did not, however, reflect any intent to permanently condemn the Mariel Cubans to the vagaries of the "entry fiction." *Amici Curiae* respectfully submit that, in interpreting section 1231(a)(6), the Court should take notice of these realities of the Mariel Cubans' existence and the Government's facilitating stance towards the Mariel Cubans as a whole.

II. Refugees Occupy A Special Status In International Law That Should Inform The Court's Construction Of 8 U.S.C. § 1231(a)(6)

As shown above, despite the particular nomenclature given to them by the U.S. Government upon their arrival, the Mariel Cubans were refugees and were brought into this country with the intent that they be permanently resettled. As refugees, the Mariel Cubans are entitled to due process rights and other benefits under international law, including the 1967 United Nations Protocol Relating to the Status of Refugees ("1967 Protocol"),[63] to which the United States is bound. These international principles outline standards for refugee treatment that contemplate that refugees be permanently resettled and accorded the same treatment provided to nationals. In short, international law prohibits interpreting section 1231(a)(6) in such a way as to deny due process rights to refugees like the Mariel Cubans.

63. *Opened for signature* Jan. 31, 1967, 19 U.S.T. 6223, 606 U.N.T.S. 268 [hereinafter 1967 Protocol].

A. This Court May Properly Look At International Law In Interpreting Section 1231(a)(6)

Amici Curiae respectfully submit that the Court should also look to the special status refugees occupy under international law in determining whether the Mariel Cubans are free from indefinite detention under section 1231(a)(6). For two centuries, the Court has recognized that "an act of Congress ought never to be construed to violate the law of nations if any other possible construction remains." *Murray v. Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804). Since then, this canon of construction has become an important component of the legal regime defining the relationship between U.S. and international law. It is applied regularly by this Court and lower federal courts, and it is reflected in the Restatement (Third) of the Foreign Relations Law of the United States § 114 (1987) ("Where fairly possible, a United States statute is to be construed so as not to conflict with international law or with an international agreement of the United States."). It is therefore appropriate that this Court's interpretation of 8 U.S.C. § 1231(a)(6) conform to international refugee law.

To the extent section 1231(a)(6) is ambiguous, the Court should consider customary international law as outlined in this brief and by other *amici*.[64] This Court announced as long ago as 1900, in *The Paquete Habana*,[65] that customary international law is "part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction as often as questions of right depending on it are

64. *See* Brief for the American Civil Liberties Union as *Amicus Curiae* Supporting Petitioner, *Benitez v. Mata*, No. 03-7434 (U.S. Feb. 25, 2004); Brief for the Lawyers Committee for Human Rights, Human Rights Watch, and Amnesty International USA as *Amici Curiae* in Support of Petitioner, *Benitez v. Mata*, No. 03-7434 (U.S. Feb. 25, 2004).

65. 175 U.S. 677 (1900).

duly presented for their determination."[66] Customary international law is therefore directly applicable to domestic adjudication by federal courts:

> For this purpose, where there is no treaty, and no controlling executive or legislative act or judicial decision, resort must be had to the customs and usages of civilized nations; and, as evidence of these to the works of jurists and commentators. . . . Such works are resorted to by judicial tribunals, not for the speculations of their authors concerning what the law ought to be, but for trust in or evidence of what the law really is.[67]

More recently, in *Filartiga v. Pena-Irala*, the United States Court of Appeals for the Second Circuit, having examined the Universal Declaration of Human Rights and other international instruments, followed *The Paquete Habana* in determining, under evolving principles of customary international law, that torture is a violation of human rights.[68]

B. The 1951 Convention And The 1967 Protocol Provide The International Framework For The Treatment Of Refugees

In the aftermath of atrocities committed by Nazi Germany during World War II, an international consensus developed that refugee issues were critical to the safety of nations and the preservation of human rights. The number of displaced persons at the conclusion of World War II totaled nearly 14 million.[69]

66. *Id.* at 700.

67. *Id.*

68. 630 F.2d 876 (2d Cir. 1980).

69. The Soviet Union claimed that it took charge of over 7.2 million forced laborers and prisoners of war. The French cared for more than 1.6 million Polish nationals, 700,000 Italians, 350,000 Czechoslovakians, 300,000 Belgians, and over 300,000 Dutch. Michael R. Marrus, *The Unwanted: European Refugees in the Twentieth Century* 3 at 299 (1985).

The United States admitted approximately 350,000 individuals who had been displaced as a result of that war.[70]

By 1950, the newly-formed United Nations[71] had initiated measures designed to define international refugee law. The first priority of the U.N. General Assembly was to establish an office that would effectively oversee international refugee issues, the United Nations High Commissioner for Refugees ("UNHCR").[72]

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70. Loescher & Scanlan, *supra* note 2, at 2.

71. On October 24, 1945, the United States accepted the Charter of the United Nations. With that acceptance, the United States agreed to promote "universal respect for, and observance of, human rights and fundamental freedoms for all." U.N. Charter art. 55. The United States further pledged to "reaffirm faith in fundamental human rights, [and] in the dignity and worth of the human person." U.N. Charter pmbl.

72. The responsibilities of the High Commissioner include:

> (a) Promoting the conclusion and ratification of international conventions for the protection of refugees, supervising their application and proposing amendments thereto;
>
> (b) Promoting through special agreements with governments the execution of any measures calculated to improve the situation of refugees and to reduce the number requiring protection;
>
> (c) Assisting governmental and private efforts to promote voluntary repatriation or assimilation within new national communities;
>
> (d) Promoting admission of refugees, not excluding those in the most destitute categories, to the territories of States;
>
> (e) Endeavouring to obtain permission for refugees to transfer their assets and especially those necessary for their resettlement;

(Cont'd)

A subsequent international conference produced the 1951 United Nations Convention Relating to the Status of Refugees ("1951 Convention").[73] The drafters of the 1951 Convention sought "to assure refugees the widest possible exercise of . . . fundamental rights and freedoms . . . and to extend the scope of and the protection accorded."[74] Under the 1951 Convention, the burden for an individual applying for political asylum to prove his or her status as a refugee is lower than that under the previous U.S. standard.[75] Instead of establishing a "clear probability" of persecution, under Article 1 of the 1951 Convention an applicant need only show that he or she has a "well-founded fear" of persecution.[76]

The United States and other non-European nations did not sign the 1951 Convention. The United States, however, later acceded to 1967 Protocol, which incorporated Articles 2 through 34 of the 1951 Convention without change.[77] By signing the

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(Cont'd)

> (f) Obtaining from governments information concerning the number and conditions of refugees in their territories and the laws and regulations concerning them;
>
> (g) Keeping in close touch with the governments and inter-governmental organizations concerned;
>
> (h) Establishing contact in such manner as he may think best with private organizations dealing with refugee questions; and
>
> (i) Facilitating the co-ordination of the efforts of private organizations concerned with the welfare of refugees.

G.A. Res. 428, U.N. GAOR, 5th Sess., Supp. No. 20, at 47, U.N. Doc. A/1775 (1950).

73. July 28, 1951, 189 U.N.T.S. 150 [hereinafter 1951 Convention]. The Convention became effective on April 22, 1954.

74. *Id.* pmbl., 189 U.N.T.S. at 150.

75. *Id.* art. 1, 189 U.N.T.S. at 152-56.

76. *Id.* at 154.

77. 1967 Protocol, *supra* note 63, art. 1(1), 19 U.S.T. at 6225, 606 U.N.T.S. at 268.

1967 Protocol without reservations, the United States bound itself to the articles and precepts of the 1951 Convention.[78]

The 1951 Convention provided a foundation for the substantive provisions of the 1980 Act.[79] On March 17, 1980, Congress enacted the 1980 Act, acknowledging during the accompanying debates its intent to conform to the standards of the 1951 Convention and the Protocol.[80] The 1980 Act declared that it was "the historic policy of the United States to respond to the urgent needs of persons subject to persecution in their homelands."[81] Congressman Rodino, in voicing his support for the legislation, described the 1980 Act as:

> [O]ne of the most important pieces of humanitarian legislation ever enacted by a United States Congress. . . . By [its] deep dedication and untiring efforts, the United States has once again . . . demonstrated its concern for the homeless, the

78. *See Mosquera-Perez v. INS*, 3 F.3d 553, 556-57 (1st Cir. 1993) (explaining that the Refugee Act of 1980 attempted to comply with the 1967 Protocol by incorporating Articles 2 through 34 of the 1951 Convention); *see also* United Nations High Comm'r for Refugees, *Handbook on Procedures and Criteria for Determining Refugee Status Under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees* ¶ 9, U.N. Doc. HCR/IP/4/Eng/REV.1 (1992) (concluding that accession to the 1967 Protocol binds signatories to the 1951 Convention's principles); 142 Cong. Rec. S11,905 (daily ed. Sept. 30, 1996) (letter from Anne Willem Bijleveld, Rep., UNHCR, to Hon. Orrin Hatch, Chairman, S. Judiciary Comm.) (noting the United States' obligations to the 1951 Convention's principles through the 1967 Protocol's incorporation of the 1951 Convention).

79. Refugee Act of 1980, Pub. L. No. 96-212, 94 Stat. 102 (codified as amended in scattered sections of 8 U.S.C.).

80. 126 Cong. Rec. 3757 (1980) ("The new definition makes our law conform to the United Nations Convention and Protocol Relating to the Status of Refugees"); *see also* H.R. Conf. Rep. No. 96-781, at 19 (1980).

81. Refugee Act of 1980, Pub. L. No. 96-212, § 101(a), 94 Stat. 102, 102.

> defenseless, and the persecuted peoples who fall victim to tyrannical and oppressive governmental regimes.[82]

Thus, the Government made a conscious policy determination to adopt the international refugee regime by ratifying the 1967 Protocol and enacting the 1980 Act. These are clear statements of U.S. domestic and foreign policy, and the Court's evaluation of the scope of *Zadvydas's* reading of section 1231(a)(6) should be informed by that same international refugee regime.

C. The 1951 Convention Mandates That Refugees Be Treated On An Equal Footing With Nationals

The 1951 Convention sets forth a number of protections afforded to refugees. At the core of these protections is the principle that refugees' rights of access to the courts should be no less than those given to nationals, which includes citizens and noncitizen residents that have applied for citizenship.[83] *See* Article 16 of the 1951 Convention (providing that refugees shall have the right to "the same treatment as a national in matters pertaining to access to the Courts, including legal assistance").[84]

82. 126 Cong. Rec. 1519, 1522 (1980).

83. The 1951 Convention endorses the sovereign's interpretation of what constitutes a "national." 1951 Convention, *supra* note 73, art. 1(E), 189 U.N.T.S. at 156 ("This Convention shall not apply to a person who is recognized by the competent authorities of the country in which he has taken residence as having the rights and obligations which are attached to the possession of the nationality of that country."). United States law defines a "national of the United States" as "(A) a citizen of the United States, or (B) a person who, though not a citizen of the United States, owes permanent allegiance to the United States." 8 U.S.C. § 1101(a)(22). To qualify as a national, a noncitizen resident of the United States must have applied for citizenship. *See, e.g., Hughes v. Ashcroft*, 255 F.3d 752, 756 (9th Cir. 2001); *United States v. Morin*, 80 F.3d 124, 126 (4th Cir. 1996); *Carreon-Hernandez v. Levi*, 543 F.2d 637, 638 (8th Cir. 1976).

84. 1951 Convention, *supra* note 73, art. 16., 189 U.N.T.S. at 164.

Article 16 has powerful implications for this case: its mandate that refugees be treated like nationals regarding access to courts and other fundamental rights prohibits the line-drawing the Government seeks to read into section 1231(a)(6). Indeed, Article 16 sets the baseline of due process rights for refugees at that given to nationals. Treating refugees differently from other nationals is the very result Article 16 prohibits.

Article 16 of the 1951 Convention establishes that a refugee-parolee, such as Respondent here, has a protectable interest against arbitrary and indefinite detention that is distinct from his or her initial admission or application for admission. Likewise, U.S. courts have long recognized that an alien's interest in admission is separate from his or her interest to be free from indefinite detention, the latter of which is protected by the due process clause. *See Wong Wing v. United States*, 163 U.S. 228, 238 (1896) ("Applying this reasoning to the fifth and sixth amendments, it must be concluded that all persons within the territory of the United States are entitled to the protection guaranteed by those amendments, and that even aliens shall not be held to answer for a capital or other infamous crime, unless on a presentment or indictment of a grand jury, nor be deprived of life, liberty, or property without due process of law."); *United States v. Henry*, 604 F.2d 908, 914 (5th Cir. 1979) ("Therefore, an alien who is within the territorial jurisdiction of this country, whether it be at the border or in the interior, in a proper case and at the proper time, is entitled to those protections guaranteed by the Fifth Amendment in criminal proceedings which would include the Miranda warning."), *overruled on other grounds by United States v. Corral-Franco*, 848 F.2d 536 (5th Cir. 1988). To continue a refugee-parolee's confinement under section 1231(a)(6) beyond the six months presumptive limit established by this Court in *Zadvydas* is therefore both unreasonable and unjust. In light of the fact that there is no basis under the 1951 Convention for drawing

distinctions between refugees and permanent residents, it is inconsistent with *Zadvydas* to interpret section 1231(a)(6) in a manner that diminishes due process rights.

The broad procedural protections under Article 16, moreover, represent only part of the special rights granted refugees under the 1951 Convention. Refugees also have: the right to non-discrimination as to race, religion or country of origin; the right to continuity of residence; movable and immovable property rights; artistic and intellectual property rights; rights of association; equal opportunity employment rights; the right to self-employment; the right to practice liberal professions; fair and non-discriminatory housing rights; the right to public education; the right to public relief and assistance on the same terms and conditions as nationals; the right to the benefit of labor and social security legislation on the same terms and conditions as nationals; the right to administrative assistance from the Government in obtaining documents and certifications; the right to have identity papers issued in the absence of a valid travel document; the right to travel documents for the purpose of traveling outside the issuing nation; the right not to have to pay fiscal charges and taxes higher than those imposed on nationals; the right to transfer assets; and the right to naturalization and assimilation.[85] These essential rights confer on refugees the very protections and privileges that allow them to integrate into and develop ties with their new communities.

Collectively, the due process protections of Article 16 and the extensive bundle of rights outlined above evidences the intent of international refugee law to ensure that refugees be treated as a permanent part of the community. The Government's reliance on the "entry fiction," runs counter to this intent and creates an unwarranted distinction under section 1231(a)(6) between certain refugees like the Mariel

85. 1951 Convention, *supra* note 73, arts. 3, 10, 13, 14, 15, 17, 18, 19, 21, 22, 23, 24, 25, 27, 28, 29, 30, and 34, 189 U.N.T.S. at 156, 160-76.

Cubans, on the one hand, and, on the other, those aliens who it deems to have effected an "entry" simply because they did not enter under the Government's parole power. Thus, insofar as the Government's distinction between refugee-parolees and residents relies on this "entry fiction," visiting students, temporary workers, and others who have effected an "entry" other than under the Government's parole power (including those who crossed the border illegally), would be entitled to far greater rights than the Mariel Cubans. Indeed, the Government recognizes that *Zadvydas* applies to all those groups, but not to Mariel Cubans. *See* 8 C.F.R. § 241.13 (regulation issued by the Department of Homeland Security soon after *Zadvydas*, allowing for special review and release of certain aliens who can show that it is unlikely they will be removed from the country in the reasonably foreseeable future. The regulation, however, has a limited application and specifically does not include Mariel Cuban parolees.). Given the background of the Mariel Cubans' arrival and subsequent treatment as refugees permanently resettled here, the Court should eschew any construction of section 1231(a)(6) that would have the absurd result of conferring greater rights on aliens who enter the United States on a temporary basis than on refugees who were permanently resettled.

CONCLUSION

Amici Curiae respectfully request that the Court affirm the holding of the United States Court of Appeals for the Ninth Circuit.

Respectfully submitted,

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